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The Question as it Stood Before the War.

BY

J. M. BUNDY.

WITH AN HISTORICAL LETTER

By Senator Howe, of Wisconsin.

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PREFATORY.

The excuse for the republication of this pamphlet is to be found in the following request, signed by several eminent members of the Wisconsin bar:

Milwaukee, *October* 26, 1869.

J. M. Bundy, Esq.:

Dear Sir—We understand that the very able argument published by you in pamphlet form, several years since, upon the general subject of the appellate jurisdiction of the Supreme Court of the United States over State Courts, in matters involving rights claimed under the Constitution and laws of the United States, is out of print, and cannot be obtained. It formed part of an interesting discussion in our State, and its ability and research ought not to be lost; because, although the immediate occasion for its original publication has passed, yet the general question, in various phases, will continue for several years, under the recent legislation of Congress for the removal of certain cases from State to Federal Courts.

We therefore suggest that you would render a great service to the profession and the public by republishing your argument, and thus affording the public an opportunity to obtain it.

Very respectfully,

Matt. H. Carpenter,
Timothy O. Howe,
S. J. Todd,
N. S. Murphy,
Winfield Smith,
Emmons & Van Dyke,
C. A. Hamilton,
George Cogswell,
J. M. Bingham,
Walter S. Carter,
James G. Jenkins,
D. H. Johnson,
Geo. H. Goodwin.

The pamphlet referred to was written in the winter of 1859 and in the early spring of 1860, while I was a young lawyer, without clients, in the small interior city of Beloit, in Wisconsin. It first appeared in the shape of a series of articles contributed from week to week to the Beloit *Journal*, which were intended to influence thoughtful Republicans to withhold their support from the Calhoun theories of government at that time popular in the State. Having at my disposal a very good collection of the authorities which develop the history of our Government, and having a strong tendency towards the investigation of such subjects, I lived at that time among my books, and from the great men who founded our Government was enabled to overlook the party exigencies of the time, and to examine the issues they brought with more calmness than a successful lawyer or politician could have commanded.

The immediate issue which my argument was intended to meet was whether, in the choice of a Chief Justice, Wisconsin would virtually vote to nullify the Fugitive Slave Law, and to deny the sovereign power of the Union. Those who were not in the State at that time can form no conception of the strength of the popular sentiment which then ran in this direction. In 1857 this sentiment was so strong that Judge Howe, then confessedly the foremost Republican leader in the State, was defeated for the United States Senate, because he would not, by a non-committal letter, enable the Republican members of the Legislature to follow their own choice and at the same time to reconcile their constituents to their action. This happened, although Judge Howe was one of the earliest and most determined enemies of the Fugitive Slave Law. It was not until the ominous threatenings of another phase of "State Rights" agitation were heard from the South that this sacrifice of a fearless and honest statesman was atoned for by his almost unanimous election, in the winter of 1860–61, to the seat he has since held and honored.

As Senator Howe was the foremost leader of those Wisconsin Republicans who sustained the national authority, even when that authority presented itself in its most odious character, I

wrote to him last winter, asking him to give a brief history of the discussion which called out my humble argument. I also intended to rewrite the argument itself, and to eliminate its crudities and imperfections. But the engrossing cares of journalism have left me no time for such a task, while, until recently, Senator Howe has not been able to find leisure to comply with my request.

On the receipt of his very kind letter, which is given below, I determined to reissue the argument just as it was originally published, and to ask the indulgence of its readers for its many imperfections. The letter of Judge Howe speaks for itself, and will explain better than anything I could write why and how it was that such a State as Wisconsin came so near to the dangerous attitude of actual nullification. I give this letter without further comment:

GREEN BAY, WISCONSIN, *Sept.* 26, 1870.

MY DEAR MAJOR BUNDY:

I am glad to learn, as I do, that you are about to publish a new edition of your excellent essay on the question of State Rights, the first issue of which came out in 1860. It is true that the special occasion which called the pamphlet out is long since passed. It is true that the great debate in which it bore a prominent part is closed, it is to be hoped, forever. It is true that the peculiar theory of government which it so ably combated is finally exploded. But, notwithstanding, I think it well and timely to reproduce your great argument.

The world is agreed upon the propriety of building monuments to commemorate the birth of great truths. Why is it not well, also, to place head-boards by the graves where great errors are buried? No more specious, and, if judged by its fruits, no more malignant falsehood than that you assaulted has been buried during this century. Few, in any century, have been destroyed at greater cost. It seems almost incredible now that there could have been lawyers, statesmen, patriots, so recently as ten years ago, who could seriously insist that each State of our Union had secured to it, in and by the Federal Constitution, the high prerogative of determining for itself what Federal enactments were or were not valid. Historically we know—and we always knew when we would listen to history—that it was that very prerogative which

proved so fatal to the States under the Confederation. It was that very prerogative which it was the leading purpose of the Constitution to wrest away from the States.

But there was a party in the country of those who did not mean to surrender that prerogative. They were willing to enter into almost any sort of league, but they were not willing to submit to a government.

And it must be confessed that it requires the exercise of great magnanimity, or the presence of urgent necessity, to persuade thirteen sovereigns to be resolved into one. But that necessity was upon the fathers, and their magnanimity was equal to it.

Still, the party which protested against the surrender of that baneful State prerogative was very reluctant, after the Constitution was adopted, to acknowledge that it had been surrendered. Accordingly, it has been asserted, more or less explicitly, on several different occasions in our history.

It was avowed with considerable emphasis in Virginia and Kentucky, as a means of resistance to the obnoxious measures of John Adams' administration.

It was rather vaguely threatened in New England, as a resort against the war measures of Mr. Madison's administration.

It was openly proclaimed in South Carolina, as a method of abrogating the tariff laws, during General Jackson's administration.

It was urged with much popular zeal in Wisconsin, in opposition to the Fugitive Slave Law.

It was finally asserted by the authorities of eleven States, in repudiation of all Federal control, under the administration of Mr. Lincoln. It was then brought to the arbitrament of solemn war—as all knew, if persisted in, it must sooner or later come.

The result, very fortunately for all the future, was a vindication of national rights, and a condemnation of State pretences.

The particular occasion which gave rise to your pamphlet was the discussion which this doctrine of State supremacy underwent in this State during the years from 1854 to 1860.

Perhaps in no State of the Union was hostility to the Fugitive Slave code more pronounced or more general than in Wisconsin. That hostility was not confined to the ranks of any one political party.

In 1854 a fugitive, arrested under the provisions of that code, was rescued by a mob, and sent out of the country. Men of all political parties joined in the rescue. Subsequently two of the rescuers were

arrested upon complaint for a violation of that law. A writ of Habeas Corpus was issued and returned before a Democratic Justice of the Supreme Court. To the satisfaction of nearly the whole people, and to the great delight of a large majority, he ordered the alleged culprits to be discharged, and he pronounced the act to be unconstitutional and void.

Subsequently the same parties were arrested in the United States District Court for this district, for the same offence. They were tried, convicted, sentenced to imprisonment, and actually imprisoned in pursuance of the sentence. Application was thereupon made to the Supreme Court for another writ of Habeas Corpus, which was issued, and upon its return the prisoners were again discharged. The three Judges, two of whom were Democrats, held that no offence within the provisions of the Fugitive Slave Act was charged in the indictment upon which the prisoners had been convicted. One of the Judges went further, and asserted the ultimate of the State sovereignty theory. He argued that the law having been pronounced unconstitutional by the Supreme Court of the State, it was therefore void within the State, regardless of what might be thought or resolved by the Federal Courts. Even this proposition, as it seemed to offer the surest protection against an odious act, was hailed with great satisfaction by the great majority of those who opposed that law. And, although there were many Republicans who did not believe in the soundness of that political theory, yet there was more or less talk of incorporating the principles into the creed of Wisconsin Republicanism.

The judgment of our Supreme Court, in the Habeas Corpus case, was taken to the Supreme Court of the United States, and there reversed.

Here was open conflict between the highest judicial tribunals of the respective governments. The Supreme Court of the United States held the imprisonment legal. The Supreme Court of this State held it illegal. The question as to which of these two judgments should bear rule in Wisconsin became one of absorbing interest in the State.

In 1859 the composition of our Supreme Court had been considerably changed. The former Chief Justice had died, and the present Chief Justice had been appointed in his place. The term of one Associate had expired; and the present Judge Paine, who had been of Counsel for the prisoners in the Habeas Corpus cases, had been elected in his place.

The prisoners had been again confined, in pursuance of the judgment of the Supreme Court of the United States. And to our court, constituted as above, they again applied for a discharge. The application was denied. But it was understood that one Judge favored the application, that another opposed it, and that Judge Paine, because of his former relations to the parties, declined to give any opinion in the case. In the spring of 1860 an election was to take place for a Chief Justice in place of Chief Justice Dixon, whose appointment would then expire. The canvass for his successor at once commenced. As he had decided to follow the judgment of the Federal Court, a very lively interest was manifested to secure a successor who would concur in issuing the order for the defiance of the judgment of the Supreme Court of the United States.

Had that effort succeeded, it is not easy to see how Wisconsin could have escaped an open rupture with the National Government; so that Mr. Lincoln, upon his advent to the Presidency, would have found instead of one, two hostile forces in the field, having not the least sympathy with each other, yet both denying the National authority.

It was during that canvass that your essay made its first appearance. It was admitted then to be a very candid, dispassionate, and able discussion of the question. It contained the most complete presentation of the authorities bearing upon the question which had appeared in the whole course of the debate.

It is not too much to claim that it had an important influence in producing the happy result of that struggle.

But notwithstanding the masterly array of authorities you presented on the National side, it is somewhat doubtful if they were then considered with that enlightened candor to which they were entitled. There is reason to believe that your argument would be read much more considerately now than it was then. Its soundness has been vindicated by the result of the war. Its truth has been sanctified by the sacrifice of a great deal of precious life. For these, among other reasons, I am glad you are to give it again to the public.

Yours sincerely,

TIMOTHY O. HOWE.

STATE RIGHTS

AND THE

APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

THE questions involved in a consideration of the Appellate Jurisdiction of the Supreme Court of the United States, are of a purely legal character.

They arise in the interpretation of the Constitution, and are to be determined by a reference to the terms of that instrument, aided by all the light which the history of its formation, and of the contemporaneous and subsequent exposition of, and practice under it, may afford.

If, from all of these sources of investigation, there arises a fair construction of the Constitution which is contrary to our notions of what ought to be, we should still recognize its force in considering what is, the fundamental law of the land. We should, as a matter of course, in endeavoring to ascertain the powers given by the Constitution, throw aside all considerations as to the inconveniences, or even as to the dangers, likely to ensue from any construction to which we may be led in an honest and thorough study of its provisions.

If dangerous powers are given by that instrument, it is certainly matter for deep regret, and the consideration of them would have been proper for the Convention which made, and for

the people who ratified it; and we find that both the Convention and the people did consider nearly all of the objections which have since been made to the Constitution.

Or, if dangers are now apprehended from the exercise, by any branch of the Government, or by the Government of the United States collectively, of powers granted by the people in the Constitution, that instrument provides a peaceful remedy by amendment.

If the people of the United States have so far degenerated, that under their authority unendurable oppression is suffered by any portion of them, and there is no hope of peaceable redress, there remains the Divine Right of Revolution.

But if we would ascertain what is the meaning of the Constitution, we must, as I have said before, look to its terms, its history, and the expositions and practice of those whose authority is the most conclusive upon the subject.

As those who have controverted the Appellate Jurisdiction of the Supreme Court have always sought extraneous support for their construction of the Constitution in a peculiar theory of the nature and objects of that instrument, it will be proper to go into a fuller consideration of the purposes of its framers than would otherwise be necessary. A plain and unforced interpretation presents so many difficulties in the way of a denial of this jurisdiction, that it has always been deemed necessary, by those who have wished to argue it out of the Constitution, to go outside of that instrument for phrases and theories, apt for their object.

These phrases and theories may have had a limited circulation, and may have been adopted and believed in by a very small moiety of the American people previously to 1829–30, but it was not until the treasonable ambition of Mr. Calhoun had found its fit supporters in the disloyal State government

of South Carolina, that the hideous features of *nullification* were presented to the country in such a manner as to excite much attention. The "Virginia resolutions of 1798," of which so much use has been made, were in no sense the precursors of nullification, as I shall hereafter show by the very best of all authorities, that of the author of them—Mr. Madison. The bare suspicion of nullification which attached to the "Hartford Convention," sufficed to wither the prospects of some of the most worthy and ablest public men of New England. Yet, we know now that this suspicion was a bitter injustice to them. It was the unenviable distinction of the "Tory State of the Revolution," under the leadership of her restless and far-seeing statesman, to fling the gauntlet before an astonished country, in behalf of doctrines which, at that time, seemed to men of all parties to be dangerous innovations upon the established political faith of the American people.

Mr. Calhoun was wise enough to see that in a few years the control of the General Government would pass from Southern to Northern statesmen, and he wished to establish in advance a theory of the Constitution which would enable the Southern States to defeat the national policy when it should become hostile to slavery. This theory, at whose birth Mr. Webster acted rather unacceptably as accoucheur, was brought before the Senate of the United States in 1830, and may be stated thus, as Mr. Webster stated it, without any demur on the part of Mr. Calhoun:—

"1. That the political system under which we live, and under which Congress is now assembled, is a compact to which the people of the several States, as separate and sovereign communities, are the parties.

"2. That these sovereign parties have a right to judge, each for itself, of any alleged violation of the Constitution by Congress; and in case of such violation to choose each for itself its own mode and manner of redress."

In these propositions, and in their expositions by Mr. Calhoun, in the course of the debates arising out of them, we find the originals of all the subsequent judicial decisions, speeches, and newspaper articles upon his side of the "State Rights" question. The arguments, the theories, the phrases, are all his, and the question of the Appellate Jurisdiction is involved in their truth or falsity.

I propose, therefore, to present, as briefly as the subject will admit, what I regard as the main features of the government "established" by the Constitution. In doing so, I shall follow the safe rule of interpretation laid down by Mr. Jefferson, in answer to doubts expressed by the Legislature of Rhode Island as to the policy of his administration, he being supposed to be hostile to the Constitution as it was.

Said he: "The Constitution shall be administered by me according to the safe and honest meaning of the people at the time of its adoption, a meaning to be found in the explanations of those who advocated, not of those who opposed it. These explanations are presented in the publications of the time." Of these publications, the "Federalist," written by Jay, Madison, and Hamilton, who had as great a share in making the Constitution as any, was the chief, and by far the most influential, in securing the adoption of it by the people.

Looking first, then, to the Constitution itself, we find in the Preamble a short, succinct, and authoritative declaration of the great objects which were to be secured by its adoption, and of the source of the powers to be exercised under it, namely, the people of the United States. The first of these objects was, "to form a more perfect Union." "More perfect" than what? Every one knows to what this refers, and what must have been in the minds of those who inserted it.

The colonies had made several attempts at union. As early

as 1643, Massachusetts, Plymouth, Connecticut, and New Haven, united for protection from the Indians and Dutch. This union gave power to three-fourths of the delegates to bind the whole confederacy, and lasted until 1686. In 1754 there was a Congress of Commissioners from New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, and Maryland. This was called by the "Lords Commissioners for Trade and the Plantations," to consider the defence of America in the case of a war with France, then impending. The object of the British government in this movement was to make treaties with the Indians; the object of Massachusetts in seconding it was to form articles of union and confederation with the other colonies, for their general security in peace as well as in war. This Convention resolved unanimously that a union of the colonies was absolutely necessary for their preservation. They proposed a plan of Federal government, consisting of a general council of delegates to be chosen by the Provincial Assemblies, and a President-General, to be appointed by the crown. This council were to have powers of war and peace in respect to the Indians; to make laws for the government of new territories; to raise troops, and to make laws, and to levy general duties, imposts, and taxes for these necessary purposes, subject to the immediate negative of the President, and the eventual negative of the King. This plan was rejected by every provincial assembly, as well as by the crown, on account of the jealousy on the part of the crown and the people of each other. Soon after the first attempt upon chartered privileges by the Stamp Act, a Congress of delegates from nine colonies assembled at New York in October, 1765.

This Congress digested a Bill of Rights. It was preparatory to a more general Congress in September, 1774. The acts and

claims of the British government alarmed the whole country, and the twelve colonies united in sending delegates to Philadelphia. This, the first Continental Congress, asserted the unalienable rights of British freemen, pointed out the system of violence preparing against those rights, and bound them by "the ties of honor and country" to renounce commerce with Great Britain. The action of this Congress received prompt and universal obedience, and the Union thus formed was continued by a succession of delegates in Congress. In May, 1775, a Congress again assembled in Philadelphia, and was clothed with ample discretionary powers. This Congress prepared the colonies for resistance, published a declaration as to the causes and necessity of taking up arms, and proceeded at once to levy and organize an army, to prescribe rules for the government of their land and naval forces, to contract debts and emit a paper currency; assuming all the powers of national sovereignty, until they at last, on the Fourth of July, 1776, took a separate and equal station among the nations of the earth, by declaring the United Colonies to be "free and independent States."

The general conviction of the importance and value of the Union appears evident in all the proceedings of Congress; and as early as the Declaration of Independence it was thought expedient, for its security and duration, to define with precision and by a formal instrument the nature of the compact, the powers of Congress, and Residuary Sovereignty of the States. On the 11th of June, Congress undertook to digest and prepare articles of confederation; but notwithstanding the great perils of delay, it was not until the 15th of November, 1777, that Congress could so far unite the discordant interests and prejudices of thirteen distinct communities as to agree to the articles of confederation. And when these were submitted to the State

Legislatures, they were declared to be the result of impending necessity and of a disposition to conciliate; and were agreed to, not for their intrinsic excellence, but as the best practical approximation thereto. These articles were merely a digest, and even a limitation in the shape of a compact, of those undefined and discretionary powers delegated by the people to the Congress of 1775, which had been freely exercised and implicitly obeyed.

The confederation, from its very nature, was found less and less adequate to the purposes of a united government, having, in fact, scarcely any of the attributes of a government; and by 1785 it was a mere nullity, as all mere compacts between sovereign powers must ever become. Still, it will be seen by any one who reads the history of this country, that from the beginning the most advanced minds were looking for a closer and more intimate Union of all the colonies; and it is pleasing to trace the successive steps of the colonists in this direction. Each attempt of this kind served as the basis for another, more comprehensive and effectual. The colonists had tried the system of a compact between sovereign States, and found it wholly deficient in meeting the needs of the country, and, to use the words of John Jay, in the "Federalist," "Still continuing no less attached to Union than enamored of Liberty, they observed the danger which immediately threatened the former, and more remotely the latter; and being persuaded that ample security for both could only be found in a national government more wisely framed, they, as with one voice, convened the late convention at Philadelphia to take that important object into consideration."

The second object was, "to establish justice." The States acting individually under the confederation gave undue preference to their own citizens in their legislation and in their

courts, and interfered with private contracts; refusing to pay foreign creditors, and involving the whole country in difficulties, by unjust and injudicious legislation. With no more efficient control over them than was possessed by the Federal Congress, these results were inevitable. This was brought prominently before the conventions called to consider the adoption of the Constitution, and ably presented in all of them. The remarks of Oliver Ellsworth, one of the leading minds of the old Federal Congress, and of the Convention which framed the Constitution, are a fair specimen of the views of those who advocated its adoption. Addressing the Connecticut Convention, he said, among other things: "Union is necessary to preserve commutative justice between the States, &c., &c. A more energetic system is necessary. The present is merely advisory. It has no coercive power. Without this, government is insufficient, or rather is no government at all. But, it is said, such a power is not necessary. States will not do wrong. They need only to be told their duty, and they will do it. I ask, sir, what warrant there is for this assertion?" (*Hollister's History Conn., vol. 2, p. 457.*)

The third object was to "ensure domestic tranquillity." There were many strong reasons why a more vigorous and national government was needed to secure this object. I shall mention but a few, bearing on the questions to be considered. The controversies between Connecticut and Pennsylvania, between New York and Vermont, Connecticut and Rhode Island, and in fact between nearly all of the States; the apportionment of the public debt; laws in violation of private contracts, amounting to aggressions on the rights of the States injured by them, and a hundred other sources of interminable domestic difficulties—appeared to the framers of the Constitution to demand something more than a mere league of

the States—something more than a mere compact, which the States might construe as seemed right to each of them.

Oliver Ellsworth fairly expressed the wants of that time, in his speech before the Connecticut Convention, which is given at length in Hollister's History, vol. 2, p. 457. "We must unite," said he, "in order to preserve peace among ourselves. If we are divided, what is to hinder wars from breaking out among the States? States, as well as individuals, are subject to ambition, to avarice, to those jarring passions which disturb the peace of society. What is to check them? If there is a parental hand over the whole, this and nothing else, can restrain the unruly conduct of the members."

The next object was "to provide for the common defense." The infinite difficulties which constantly beset the operations of the army during the revolution, from the lack of a coercive power in the confederation compact to enforce its requisitions, had demonstrated the necessity of a General Government vested with powers coextensive with all the exigencies of war. The Congress of the Confederation had, nominally, unlimited discretion in making requisitions of men and money, in the government of the army and navy, and in the direction of their operations, but in the words of Hamilton (*Fed.* No. 23): "As their requisitions were made constitutionally binding on the States, * * the intention evidently was that the United States should command whatever resources were by them judged requisite to the common defense and general welfare. * * The experiment has, however, demonstrated that this expectation was ill-founded and illusory, * * * and that there is an absolute necessity for an entire change in the first principles of the system."

The next object was to "promote the general welfare." Says Judge Story, in his commentary upon this passage, § 56:

"The idea of a permanent and zealous co-operation of all the States in any one scheme for the common welfare, is visionary. No scheme could be devised which would not bear unequally upon some particular section of the country; and these inequalities could not be, as they now are, ameliorated and corrected under the General Government, by other corresponding benefits." The adversaries of the Constitution, who opposed it because too great powers were given by it to the Federal Government, were thus answered by Hamilton (*Fed.* No. 23): "The powers are not too extensive for the objects of Federal administration, or, in other words, for the management of the national interests." The friends of the Constitution saw no other adequate means of "promoting the general welfare," than in the establishment of a government having powers as extensive as the interests it was to foster.

The concluding object stated in the Preamble is "to secure the blessings of liberty to us and our posterity." This was the grand object, that which with the friends of the Constitution included all others dear to a people who had suffered, and dared—as had our fathers in its defence. That no mere compact could secure its blessings to them permanently, was the expressed conviction of nearly all the more prominent statesmen who had witnessed the weakness and imbecility of the Confederation. Washington expressed the sense of the best minds in the country when he wrote, in reply to a gloomy letter of John Jay's, the following words of wisdom:—"We have errors to correct. We have probably had too good an opinion of human nature in forming our Confederation. Experience has taught us that men will not adopt and carry into execution measures the best calculated for their own good, without the intervention of coercive power. I do not conceive we can exist long as a nation without lodging, somewhere, a power which

will pervade the whole Union in as energetic a manner as the authority of the State governments extends over the States."—Irving's Life, vol. 4, p. 449.

It was the opinion of the friends of the Constitution, "that the vigor of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, this interest can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people, than under the forbidding appearance of zeal for the firmness and efficiency of government." Hamilton, *Fed.* No. 1.

These practical men, who had bitter experience of the dangers to liberty growing out of a Union of the States, which, having no cohesive power except the sovereign will of each of them, knew that no Union would secure the liberty of the people, from foreign foes and domestic factions, unless it was "established by the people," and though limited in its power, should be supreme within its sphere of action."

The concluding phrase or predicate of the Preamble, and the opening or subject, indicate plainly the nature of the Constitution. "We, the people of the United States, * * * do ordain and establish this Constitution for the United States."

Here we have the source of the power given, namely, the people of the United States; and the nature of the act which gives them, namely, an act of sovereignty—the words "do ordain and establish," being as authoritative as any which a sovereign could use. These words were a mere form until the people had given them vitality and power—then, they became the fiat of the sovereign authority, declaring by their ratification the will of the sovereign people of the United States, which, by the American philosophy, is the highest of all authorities. This act, of course, derogated in many respects from the powers

of the existing State sovereignties. This fact was frequently urged by the opponents, and admitted by the friends of the Constitution when it was before the people for their ratification. It established a supreme law of the land, and a government adequate to its execution and administration. Within the sphere in which it was designed to operate, the people thereby established a government as complete in all its departments and endowed with as plenary powers as any of the State governments within the limits of the States. What trace is there of a "compact between the States," in this unmistakable declaration of the people's will?

If the States had desired to make a compact, they would certainly have done so, and called it a compact, not a Constitution. The men of those days knew the meaning of words of a legal or political character, and were as exact in the use of them as the men of any time or country.

Of all the words in the language, this sacred word Constitution was to their minds surcharged with meaning, and of the most definite and important character. In it was embodied their noblest conception of legitimate and orderly Freedom and their highest ideal of earthly authority, as a direct emanation from the will of the people, through whatever means it may be expressed. The meaning of the word compact was, too, quite as well understood by the framers of the Constitution, as it is now, even with the aid of Mr. Calhoun's metaphysics. They were tired of the confederation, principally, because it was a compact, and they wanted in place of this a Constitutional government, established by the people, for the whole Union. It seems impossible that any one should study the language of the Constitution and of the articles of Confederation, and not see that while the latter may be construed as a compact between the States, the former is declarative of the sovereign

will of the people. In fact, the very first resolution which the Convention adopted, was "that a national government ought to be established, consisting of a supreme legislature, judiciary, and executive."

And in the final report of the Convention, submitted by "George Washington. President. By unanimous order of the Convention," we find the following emphatic declaration of that body, which indicates unmistakably what they meant to effect.

Says the report: "It is obviously impracticable, in the Federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest."

In further proof that it was because of the inefficiency of the then existing compact between the States that the friends of the Constitution desired a government deriving its powers from the people, and supreme, as to the objects committed by it, to the people—let us see what Hamilton (*Fed.* No. 22), said in advocacy of the Constitution:

"It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the People. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has in some instances given birth to the enormous doctrine of legislative repeal. Owing its ratification to a law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a party to a compact has a right to revoke that compact, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves

the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority."

The only function which the States performed in their governmental capacity, in relation to the Constitution, was of a purely preparative character. The powers of the State sovereignties, being entirely derivative, and for purposes and with jurisdictions bounded by their respective territorial limits, it was clearly impossible for them to establish a government transcending these limits. Accordingly we find that they only afforded the machinery by which the people in their original sovereign capacity could act. They (the State sovereignties) appointed the delegates to the Convention which framed the Constitution. It was reported to Congress, with a recommendation "that it might be submitted to a Convention of delegates, chosen in each State by the people thereof, for their assent and ratification." In pursuance of this recommendation, and through the means provided by the State sovereignties, the people of each of the States assembled in convention and ratified the proposal made to them through the instrumentality of their servants and agents, and then it became the supreme law of the land. The government thus established derived none of its powers from the existing State sovereignties, but proceeded directly from the people, as directly as any of the State governments, and much more directly than some of them. The State sovereignties "prepared the way" for the action of a "greater than they." They "proposed," but the people "disposed."

The powers of the former were exhausted when they had

provided a convenient method of ascertaining the popular will; the latter alone, the people, could create a new government, supreme within the limits assigned by them, over their State sovereignties, which they retained for State and local objects, while thus, by the most solemn expression of their will, they subordinated them, in some respects, to the government of the Union.

Says Chief Justice Marshall, in his decision of McCulloch *vs.* State of Maryland, 4 Wheaton, 316: "It is true they assembled in their several States; and where else should they have assembled? No political dreamer was wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not on that account cease to be the measures of the people themselves, or become the measures of the State governments. From these conventions the Constitution derives its whole authority. The government proceeds directly from the people, and is "ordained and established" in the name of the people. * * * * The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived by the State sovereignties.

"It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But surely the question whether they may retain and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the General Government be doubted, had it been created by the States. The powers delegated to the State

sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league, such as was the Confederation, the State sovereignties were certainly competent. But when, "in order to secure a more perfect union," it was deemed necessary to change their alliance into an effective government, possessing grave and sovereign powers, the necessity of referring it to the people, and deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then, * * * is practically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

No apology is necessary for so lengthy an extract from this celebrated decision. Aside from the high authority which has always, among all classes of Americans, attached to the decisions of this greatest of our jurists, whose accession to and long continuance in his high office was regarded as a national blessing, second only to that vouchsafed to us in the services of Washington, there is a clearness and precision of statement in this extract, as indeed there is in the whole decision, which must win assent from all unprejudiced minds.

Twenty-five years before this decision was made, and only a few years after the adoption of the Constitution, while yet nearly all the framers of it were alive, and influential in directing public opinion, Judge Wilson decided against the high claims of the State of Georgia, together with the majority of the Court. The decision is of a highly philosophical character, and I should like to extract the exhaustive discussion of the word "Sovereignty" contained in it, but can only quote a few words, pertinent to the immediate question in hand. The case is reported in Dallas, 419, Feb. Term, 1793.

"To the Constitution of the United States, the term 'sovereign' is totally unknown. There is but one place where it could have been used with propriety. But, even in that place, it would not, perhaps, have comported with the delicacy of those who 'ordained and established' the Constitution. They might have announced themselves 'sovereign people of the United States;' but serenely conscious of the fact, they avoided the ostentatious declaration. * * As a citizen, I know the government of that State (Georgia) to be republican, and my short definition of such a government is, one constructed on this principle, that the supreme power resides in the people.

"As a judge of this Court I know, and will decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the 'people of the United States,' did not surrender the supreme power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is not a sovereign State."

I have thus shown from the history and contemporaneous construction of the Constitution, as well as from the obvious meaning of the Preamble, the nature and objects of the government established by it. I have cited from Chief Justice Marshall and Judge Wilson, and will now proceed to cite from Judge Story, whose fame as a jurist, unimpeachable integrity of judgment, and great ability as an expounder of the Constitution, entitle whatever he says upon this matter to very great weight, aside from the authority belonging to his position upon the Supreme Bench. Says he, in "Martin *vs.* Hunter's Lessee." 1 Wheaton, 304: "The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the Preamble declares, by "the people of the United States." There can be no doubt,

that it was competent to the people to invest the General Government with all the powers which they might deem proper and necessary; to restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact, to make the powers of the State governments, in given cases, subordinate to those of the nation; or to reserve to themselves those sovereign authorities which they might not choose to delegate to either."

We have, thus, an emphatic and authoritative exposition, by two of the greatest jurists of this or any other country, as to the true meaning and import of the Constitution, in respect to the nature and powers of the government established by it. These expositions have been received as correct by the courts of nearly every State in the Union, by the executive and legislative branches of the General Government, with few exceptions, and have become incorporated into the belief of a great majority of the American people capable of considering them. I may say farther, and can prove, that they are accepted by nearly all of the leaders of both political parties, especially by the leaders of the Republican party,* the Calhoun doctrines having

* NOTE.—Since writing the above, I happened upon the following passage in a speech of Judge Collamer, in the Senate, delivered March 8th of this year. These remarks of the Senator were directed to Senator Toombs of Georgia, and were in reply to some of the "State Rights" notions of the brilliant but illogical Georgian. The extract here given is worthy of careful attention for its vigor and conciseness of argument. It need hardly be added that Judge Collamer is one of the ablest jurists in the Senate or the country.

Says the Judge:

"I deny, in the first place, that the States, as several States, entered into this compact. That, however, is repeated so often that, upon the whole, I do not know but it is believed. When a State acts, it acts in its organized capa-

lately spread to a considerable extent among the pro-slavery fanatics of the South.

As Mr. Madison's name has been used somewhat freely, in connection with nullification doctrines, and as he is an authority of the highest character, and is free, besides, from any imputation of "Federalism," his testimony upon this question is certainly worthy of the careful study of every one. Mr. Benton's "Thirty Years' View" furnishes it for us, in very convenient shape. The following extracts are from the 1st volume of that work, p. 355.

The first extracts are from a letter to Mr. Everett, published in the North American Review of August, 1830:

"It (the Constitution of the United States) was formed by the States, that is, by the people in each of the States, acting in their highest sovereign capacity; and formed consequently by the same authority which formed the State Constitutions.

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city, by its organs, by its legislature, or by its Executive. There never was one of the States of this nation that acted in that way in the adoption of the present Constitution. The people of the United States, meeting in the conventions of their several States, adopted the United States Constitution. The States never acted upon it as States. It would be a paradox that they should have done so. How could the legislature of North Carolina, for instance, invested as it was, at the time, by the people with the power to levy and collect duties upon imports—how could the State, in its organized capacity, through that organ, delegate that power to another body? It could not be done. It never was done. It never was attempted to be done. The people of the United States had to meet in their several States in their original condition, as people in convention, for these reasons: first, it was more convenient; next, if the people of North Carolina had invested their legislature with the power to levy and collect duties, the people of North Carolina alone would have the power to invest that in another body, to wit, Congress. If you called the whole people of the United States, it would be a different set of people to take that power away from the one who gave it. No, sir, it is not true that this is in that sense a confederacy. It is a national Government. I say it is a national Government, operating by its own act on individuals, and enforcing its own laws by its own executive power. The old Confederation was a failure. This is a national Government."

There is, as far as I know, no Republican Senator of national reputation who does not agree with Judge Collamer upon this question.

"Being thus derived from the same source as the Constitutions of the States, it has, within each State, the same authority as the Constitution of the State, and is as much a Constitution in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States within their respective spheres; but with this obvious and essential difference, that, being a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered, or annulled at the will of the States individually, as the constitution of a State may be, at its individual will.

"Nor is the Government of the United States, created by the Constitution, less a government, in the strict sense of the term, within the sphere of its powers, than the governments created by the Constitutions of the States are, within their several spheres. It is, like them, organized into legislative, executive and judicial departments. It operates like them, directly on persons and things. And, like them, it has at command a physical force for executing the powers committed to it.

"Between these different constitutional governments, the one operating in all the States, the others operating separately in each, with the aggregate powers of government divided between them, it could not escape attention, that controversies would arise concerning the boundaries of jurisdiction.

"That to have left a final decision, in such cases, to the States, could not fail to make the Constitution and laws of the United States different, in different States, was obvious, and not less obvious, that this diversity of independent decisions must altogether distract the Government of the Union, and speedily put an end to the Union itself.

"To have made the decision under the authority of the in-

dividual States co-ordinate, in all cases, with decisions under the authority of the United States, would unavoidably produce collisions incompatible with the peace of Society.

"To have referred every clashing decision under the two authorities, for a final decision, to the States as parties to the Constitution, would be attended with delays, with inconveniences and expenses, amounting to a prohibition of the expedient.

"To have trusted to negotiation for adjusting disputes between the Government of the United States and the State governments, as between independent and separate sovereignties, would have lost sight altogether of a Constitution and Government of the Union, and opened a direct road, from a failure of that resort, to the *ultima ratio* between nations wholly independent of and alien to each other. * * * * * * Although the issue of negotiation might sometimes avoid this extremity, how often would it happen among so many States, that an unaccommodating spirit would render that resource unavailing?"

After thus stating, with other powerful reasons, why all those fanciful and impracticable theories were rejected in the Constitution, the letter proceeds to show what the Constitution does adopt and rely on, "as a security of the rights and powers of the States," namely:

1. "The responsibility of the Senators and Representatives, in the Legislature of the United States, to the legislatures and people of the States; 2. The responsibility of the President to the people of the United States; and, 3. The liability of the executive and judicial functionaries of the United States to impeachment by the representatives of the people of the States, in one branch of the legislature, and trial by the representatives of the States in the other branch."

In the letter to Mr. Cabell, of May 31, 1830, he says:

"You will see, in vol. III., page 429, of Mr. Jefferson's correspondence, a letter to W. C. Nicholas, proving that he had nothing to do with the Kentucky resolutions of 1799, in which the word 'nullification' is found. The resolutions of that State, in 1798, which were drawn by him, and have been republished with the proceedings of Virginia, do not contain this or any equivalent word."

In another letter to Mr. Trist, dated August 25, 1834: "The letter from Mr. Monroe to Mr. Jefferson, of which you enclose an extract, is important. I have one from Mr. Monroe, on the same occasion, more in detail, and not less emphatic in its anti-nullifying language."

Says Mr. Benton, in concluding this testimony, which he gives more at large: "These extracts, voluminous as they are, are far from exhausting the abundant material which these admirable writings of Mr. Madison contain on the topic of nullification. They come to us for our admonition and guidance, with the solemnity of a voice from the grave; and I leave them without comment, to be pondered in the hearts of his countrymen."

The nature of the subject suggests the name of the heroic President who met the first overt ebullitions of State Rights fanaticism so coolly and triumphantly, by his iron nerve and good 'hard sense' suppressing the treason so artfully masked in the refined metaphysical theories of Mr. Calhoun, and affixing an odium to these theories which can never be wholly shaken off.

Said Andrew Jackson, in his memorable "Proclamation," which was hailed with hearty enthusiasm, by men of all parties and sections outside of South Carolina: "The right to secede is deduced from the nature of the Constitution,

which, they say, is a compact between sovereign States, who have preserved their whole sovereignty, and therefore are subject to no superior; that, because they made the compact, they can break it, when, in their opinion, it has been departed from by the other States. Fallacious as this reasoning is, it enlists State pride, and finds advocates in the honest prejudices of those who have not studied the nature of our government sufficiently to see the radical error on which it rests.

"The people of the United States formed the Constitution, acting through the State legislatures in making the compact, to meet and discuss its provisions, and acting in separate conventions they ratified those provisions; but the terms used in its construction show it to be a government in which the people of all the States collectively are represented.

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"The Constitution of the United States, then, formed a government, not a league; and whether it be formed by a compact between the States, or in any other manner, its character is the same. It is a government in which all the people are represented, and which operates directly on the people individually, not upon the States—they retained all the power they did not grant."

As I began with a quotation from Mr. Calhoun, I will conclude this branch of the subject with a quotation from that speech of his great opponent which has since had such wide-spread fame and has become an authority almost as highly respected as any judicial decision.

Said Mr. Webster (Senate Debates, 16th Feb., 1833): "There is no language in the whole Constitution applicable to a confederation of States. If the States be parties, as States, what are their rights, and what their respective covenants and stipulations? And where are their rights, stipulations and cove-

nants expressed? The States engage for nothing—they promise nothing. In the articles of the confederation, they did make promises, and did enter into engagements, and did plight the faith of each State for their fulfilment; but in the Constitution there is nothing of that kind. The reason is, that in the Constitution, it is the people who speak, and not the States. The people ordain and therein address themselves to the States and to the legislatures of the States, in the language of injunction and prohibition. The Constitution utters its behests in the name and by the authority of the people, and it exacts not from the States any plighted public faith to maintain it. On the contrary, it makes its own preservation depend on individual duty, and individual obligation. * * * If the Constitution is a government, existing over all the States, though with limited powers, it necessarily follows that, to the extent of those powers, it must be supreme. If it be not superior to the authority of a particular State, it is not a national government. But as it is a Government, as it has a legislative power of its own, and a judicial power coextensive with the legislative, the inference is irresistible, that this Government thus created by the whole, and for the whole, must have an authority superior to that of the particular government of any one part."

If I had access to large libraries, it would be easy to enlarge immensely the list of authorities corroborating the views I have set forth; but the limits necessarily imposed upon an essay like this would prevent more numerous citations. If, however, from these obvious reasons, my authorities are few, they are certainly the highest and most venerable known to our Constitutional Jurisprudence.

I have cited from Washington, Jefferson, Madison, and Jackson; from Ellsworth, Jay, Wilson, Marshall, and Story;

from Hamilton, Webster and Benton. Mr. Jefferson's opinions were different, in many respects, from those of the framers of the Constitution, but as President, sworn to observe the Constitution, as it was, as "the" supreme law of the land," he felt bound by its provisions, "as interpreted by its advocates." All of these "advocates and friends of the Constitution, at the time of its adoption," believed that it established a national Government, limited in its sphere of operations, and instituted for certain definite purposes, but supreme within that sphere, and for those purposes.

It is obvious that the recorded opinions of these men are of the greatest weight, in reference to the meaning of that which was, to a great extent, the work of their hands. The great oracle of the old common law, Lord Coke, has given us a canon of interpretation which is strictly applicable to our present subject.

"Great regard," says he, "ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time, or soon after it was made, put upon it; because they were best enabled to judge of the intention of the makers at the time when the law was made."—Dwarris on Stat. 693.

This sound rule of interpretation never applied with more force, than to the "Federalist," of which that great jurist, Chancellor Kent, says, in his Commentaries, vol. 1, page 256. "There is no work on the subject of the Constitution, and on Republican and Federal governments generally, that deserves to be more thoroughly studied * * * "The numbers of the Federalist were read with admiration, and enthusiasm as they successively appeared. No Constitution of government ever received a more masterly and successful vindication. I know not, indeed, of any work on the principles of free gov-

ernment, that is to be compared, in instruction, and in intrinsic value to this small, and unpretending volume of the Federalist; not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke. * * * Mr. Justice Story acted wisely in making it the basis of his Commentary."

With the strong support of so high an authority, expressed so emphatically, I need not apologize for the frequent use I have made, and shall make, of the "Federalist," in ascertaining the contemporaneous construction of the Constitution. A work so illustrious from its authorship, which was so influential in forming public opinion in a great crisis, which has been, ever since its publication, the text book of statesmen, and judges to an extent unparalled in political literature, and which, by the masculine vigor of its thought, the range of its historical illustrations, and the plain, unanswerable cogency of its reasoning, is sure of an immortality of usefullness; such a work as this, is surely in no danger from newspaper squibs or Judicial, or Senatorial 'oratory.'

After this brief, and perhaps necessary digression, I will return to the more direct consideration of my subject.

The framers of the Constitution, felt the difficulties inseparable from a merely recommendatory general government, whose powers were subject to the interpretation of thirteen independent sovereignties, and so they provided that the "Constitution and the laws of the United States which shall be made in pursuance thereof, and all the treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." This would have been of but little utility, but for the previous provision, that "The judicial power shall extend to all cases in law

and in equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, &c."

This provision was made definite and effectual, by the previous section vesting the judicial power—in these words: 1. "The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time ordain and establish, &c."

In pursuance of these provisions, the first Congress, at its first session, established, in the Judiciary Act, a method of effecting them, and for bringing all questions of constitutional power to the final decision of the Supreme Court.

This, together with the act organizing the Northwestern Territory, having been passed under the influence of the men who made the Constitution, and as a completion of their designs, is of nearly the same solemnity, and authority, as the Constitution itself, and these acts stand on higher ground than any subsequent enactments of the national will.

Sixteen of the thirty-nine framers of the Constitution, were in that Congress, and of the members of the Committee who reported the Judiciary act, five out of the eight, had been members of the Convention, viz.: Oliver Ellsworth, Wm. Patterson, Caleb Strong, Richard Bassett, and Wm. Few.

It may be presumed of such men as these, that they knew how to frame a Constitutional Act, and it will hardly be suggested that they would knowingly violate the letter or spirit of the Constitution which they had helped to make and sworn to observe.

The 25th section of the act of the first Congress of the United States, approved September 24th, 1789, provides as follows:

"That a final judgment or decree in any suit in the highest

court of law or equity of a State in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute or of an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute, or of a commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the Constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the Chief Justice or Judge, or Chancellor of the Court, rendering or passing the judgment or decree complained of or by a justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court, and the proceedings upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the case for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned question of validity or construction of the said Constitution, treaties, statues, commissions, or authorities in dispute."

When this act was passed, the government was complete in all its branches. As Mr. Webster said in reply to Hayne:

"It then, sir, became a government. It had the means of self-protection; and but for this, would, in all probability, have been now, among the things which are past. Having constituted the government, and declared its powers, the people have further said, that, since somebody must decide on the extent of these powers, the government shall itself decide, subject always, like other popular governments, to its responsibility to the people."

I will now show with what view these clauses of the Constitution and the legislation in pursuance of them were regarded by the framers of that instrument, and with what interpretation they were presented to the people for their ratification and assent.

Mr. Madison, whose name is so often used by the opponents of the Appellate Jurisdiction, and Mr, Hamilton, both seem to have entertained the same opinions as to the effect of these provisions.

Says Mr. Madison, *Fed.* No. 39, after showing in what respect the government established by the Constitution was neither wholly national, nor wholly federal: "In this relation, then, the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the General Government (the Supreme Court). But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and effective precautions

are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than the local government; or to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated."

It is to this decided expression of his views that Mr. Madison refers in the following extract from the letter to Mr. Everett, already quoted from, which was written forty years after the publication of the "Federalist."

"With respect to the judicial power of the United States, and the authority of the Supreme Court in relation to the boundary of jurisdiction between the Federal and the State governments, I may be permitted to refer to the thirty-ninth number of the "Federalist," for the light in which it was regarded by its writer, at the period when the Constitution was depending; and it is believed, that the same was the prevailing view then taken of it, that the same view has continued to prevail, and that it does so at this time notwithstanding the eminent exceptions to it."

Says Hamilton, *Fed.* No. 80, "If there are such things as political axioms, the propriety of the Judiciary power of a government, being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of national laws, decides the question. Thirteen independent courts of final jurisdiction, over the same causes, arising upon the same laws, is a Hydra in government from which nothing but contradiction and confusion can proceed."

Again, in treating the same subject, No. 82, "Here another question occurs: what relation would subsist between the National and State Courts, in these instances of concurrent juris-

diction? I answer, that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution in direct terms, gives an appellate jurisdiction to the Supreme Court, in all the enumerated cases of federal cognizance, in which it is not to have an original one, without a single expression to confine its operation to the inferior Federal Courts. * * * the National and State systems are to be regarded as one whole. The Courts of the latter, will, of course, be natural auxiliaries to the execution of the laws of the Union, and the appeal from them will naturally lie, to that tribunal, which is destined to unite and assimilate the principles of national justice, and the rules of national decision. The evident aim of the Convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original, or final determination in the Courts of the Union."

Oliver Ellsworth, one of the greatest of the framers of the Constitution, in a speech advocating its adoption by the Connecticut Convention, said:

"This Constitution defines the extent of the powers of the General Government. If the general legislature should, at any time, overleap its limits, the Judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judiciary power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, if they make a law which is an usurpation upon the General Government, the law is void; and upright, independent judges will declare it to be so." Mr. Ellsworth reported the judiciary act of 1789.

It is often assumed, it is to be hoped ignorantly, that the old

"Republican" party, or a majority of its leaders, entertained views similar to those now advocated by the opponents of the Appellate Jurisdiction, and that they regarded this jurisdiction as dangerous to the freedom of the citizen. I have not the space, had I the time, to develop the historical evidence which might easily be brought to bear upon this question; still, a few representative and illustrative facts may be presented, which will, perhaps, be acceptable to those who have not investigated this subject.

A majority of the N. Y. Convention, called to consider the Constitution, were decidedly hostile to Federalism, and, for some time, to the adoption of the Constitution. It was not until they heard of the unexpected accession of the Virginia Convention, and after the ratification of the Constitution by the nine States, which was necessary to the establishment of the new government, that they were brought to the point of ratification. Yet, even then there was only the small majority of five, and they accompanied their consenting vote with several proposed amendments. Among these, we find one for depriving the "Inferior Courts," to be established by Congress in pursuance of the "Judiciary Clause," of their original jurisdiction, except in Admiralty and Maritime cases, and others of like character, "and in all other cases, to which the judicial power of the United States extended, and in which the Supreme Court had not original jurisdiction, the causes should be heard in the State Courts, with right of appeal to the Supreme or other Courts of the United States." Pitkin's History U. S., vol. 2, p. 282.

In other words, they wished to remove as many cases of original jurisdiction from the Federal District Courts as possible, without limiting or altering the revisory power of the Supreme Court. The "Republicans" of those days disliked; not

the Appellate jurisdiction of the Supreme Court, but the original jurisdiction of the District Courts. These Courts were odious to them, because they were to discharge functions previously performed by the State Courts, because they would entail unnecessary expense in Court Houses, salaries and fees, and because they would be likely to alienate the friendly feelings of the people from the General Government.

These objections were all fully brought out, in the course of the debates in the first Congress upon the Judiciary Bill.

Mr. Livermore, one of the New Hampshire Representatives, was an ardent and leading "Republican," was opposed to the provisions of the "Judiciary Act," reported by the Senate committee, and moved a change in some of these provisions; yet, as we shall see, recognized as an unquestionable fact the Appellate Jurisdiction. He opposed the system of Inferior Courts, provided for in the act:—

"Because it would be attended with great inconvenience and expense. The salaries of thirteen district Judges, and the necessary buildings for their accommodation, is no inconsiderable saving to a people oppressed so severely by the burdens of the late war. * * The Bill proposes that the State courts shall have concurrent jurisdiction with the District Courts. Now, under these two establishments, debtors may be worried and distressed more than is necessary for the plain and simple administration of justice," &c. Debates of Congress, vol. 1, page 827.

Mr. Jackson, of Georgia, another leading "Republican," coincided with these views. These gentlemen, who may be considered as fair exponents of the "Republicanism" of that day, in their respective sections, argued that the State Courts, and Federal Admiralty Courts, being bound by oath to observe the Constitution, would be safe tribunals for trying all the

cases proposed to be included within the jurisdiction of the District Courts. But, what were the arguments of these men, who were the most jealous of Federal power? Says Mr. Livermore, "If Justice cannot be had here (in the State and Admiralty Courts), there will be an appeal to the Federal Supreme Court, which is all that can be required." Says Mr. Jackson: "He was clearly of opinion that the people would much rather have but one appeal, which, he conceived, would answer every purpose; he meant from the State Courts immediately to the Supreme Court of the Continent." And afterwards, in reference to the necessity that every government should have the means of enforcing its own laws: "Are not the Judges of the different States bound by oath to support that Supreme law? * * * But does there not remain the Appellate Jurisdiction of the Supreme Court, to control them and bring them to their reason? Can they not reverse or confirm the State decrees, as they may find them right or wrong?"

Both of these learned gentlemen coincided with Judge Smith in his supposition that the State Judges were bound by the Constitution, and that they might be relied upon to be governed by it in their decisions; but neither entertained the notion that from these decisions there was to be no appeal, but seemed to regard it as a matter of course that the Supreme Court was to be the final arbiter.

Mr. Livermore's amendment to the Senate Bill, which provided for State and Admiralty Courts, in the place of the District Courts, was supported by such thorough "Republicans," as Mr. Burke, Mr. Sumter, of South Carolina, and Mr. Stone, of North Carolina, and it will be remembered that Mr. Livermore contemplated a direct appeal from the State Courts to the Supreme Court.

The same views were expressed in the heated Congressional

debates upon the Judiciary, in 1802, by the majority of the leaders of the "Republican" party of that day. The appointment, by John Adams, of an army of District Judges for whom offices had been created, during the last days of his administration, was calculated to provoke the wrath of the incoming party, and it would not have been strange, had the whole system of our Federal Judiciary, been materially changed, if not destroyed; yet we find in the debates, no arguments, or but few at least—so few as to be difficult of discovery—against the Appellate Jurisdiction.

Governeur Morris and Mr. Jackson took opposite positions in these debates, in the Senate. Senator Morris represented the "Federal," and Senator Jackson, the "Republican" party, and both of them spoke as ably as any members of either House. Towards the close of this debate (Annals of Cong. 1802, p. 181), there was a warm appeal and reply, on the part of these Senators respectively.

"Experience under the old confederation had shown," said Senator Morris, "that applications made to Congress, to large communities, were nugatory, and that to carry on the business of the National Government, it should be vested with the right of applying directly to individuals. But then, the danger that it might swallow up the sovereignty of the States, became evident. To provide against this danger, the Constitutional doctrine was established, that no powers should be exercised by Congress, but such as are expressly given, or were necessarily incident, and as a farther security, provision was made, prohibiting certain acts. But of what avail are such securities, when your legislative authority is bounded only by your discretion?"

In reply to this, and other remarks, Senator Jackson, citing the Judiciary clause of the Constitution, said, "the gentleman

therefore, may dismiss his fears, as to what may be done by the inferior (that is, the State Courts), for there is always an appeal to the Supreme Court.

Such was the unanimity among the men of both parties, during the generation which was cotemporary with the Constitutional Convention, and the first administrations under it, in regard to the construction of the Judiciary clause, as to the Appellate Jurisdiction. The objects which were to be attained by the new government, as well as the keenly remembered evils of the old confederation, and the predominant influence of the great men who had led them from the anarchy and woes of the latter, to to the order and blessings resulting from the former, all concurred in producing a great uniformity of opinion on this point.

In pursuance of the provisions of the "Judiciary Act," of 1789, appeals were taken from the Supreme Courts of various States. The first, was from Rhode Island, and the question of the Appellate Jurisdiction was not even raised, and after this, there were appeals from Maryland, Connecticut, New York and South Carolina successively, and in none of these cases, was the Jurisdiction of the Supreme Court, questioned. In the case of Smith vs. State of Maryland, 6 Cranch 286, decided in 1810, the question was raised, but not noticed by the court. Then, in the case of Fairfax vs. Hunter, 7 Cranch 603, the judgment of the Virginia court of Appeals, was reversed. The decision in that court was rendered in 1810, and it furnished a certified copy of its record to the Supreme Court, without questioning its appellate power, thus sanctioning the action of the Legislature of that State, which, in that year, responded to a proposition on the part of Pennsylvania, "to amend the Constitution, so as to provide a separate and independent tribunal, for the settlement of conflicts between the

State and Federal authorities," that the Supreme Court of the United States, as then constituted, had all needful jurisdiction, and that, they had confidence in its rectitude, and impartiality. This resolution was passed in the Virginia Legislature by a unanimous vote.

But in 1814, where the mandate from the Supreme Court, came to the Virginia Court, the State was intensely excited, on account of the difficulties between New England and the South, growing out of the Embargo; the federal principles of the former section, were involved in the unpopularity of certain acts and measures, and the action of the Court of Appeals was biased by the prevailing political excitement, as appears from the record itself. On the refusal of the Court of Appeals to obey the mandate in Fairfax vs. Hunter, the case was again presented to the Supreme Court, in 1816. Up to this time, the Supreme Court of the United States had not been called upon to determine expressly the limits of its Appellate Jurisdiction. In other words, the government had gone on for a quarter of a century, under the guidance of "the Fathers," who made the Constitution, with such unanimity of opinion, as to the true construction of the Constitution, upon this point, that a case had never been presented to the Supreme Tribunal of the Union, in which the Appellate Jurisdiction had been fairly, and fully, put in question.—During all this time, appeals had gone up from the highest courts of several of the States, as quietly, as naturally, and as unquestioned, as from their various Circuit, or County Courts, to the Supreme Tribunals of the States. And no question might have been made, for years longer, had not extraneous considerations warped the Virginia Court.

Yet it was fortunate, that the question was thus raised, at this time, when the Supreme Court was in the palmiest days

of its renown, when it was honored, and revered, to a greater degree than any other Judicial Tribunal in the world, not so much for the exalted prerogatives with which it was clothed, as for the distinguished talents, the spotless characters, and the great learning of its Judges.

In the great case which I have mentioned, and which is reported in 1 Wheaton 304, the whole question of the Appellate Jurisdiction was ably discussed, and as ably decided. The case excited the attention of the whole country at that time, and the decision of the Court upon it, became incorporated into the public opinion of the nation, to an extent which we, who live in the times of "Dred Scott" decisions, and partisan Judges, can hardly realize. A clearer, more luminous and convincing decision, was never pronounced. It would be well were every citizen of Wisconsin to read it carefully and thoughtfully, and yield to the force of its reasoning what might be denied to the mere authority of any judicial opinion, as such. The opinion of the court was delivered by Judge Story, then in the zenith of his reputation.

After stating several cases, in which points of Constitutional law might be raised in the State courts, and in which, they ought, from obvious reasons, to entertain jurisdiction, "It must therefore," says the Judge, "be conceded, that the Constitution not only contemplated, but meant to provide for, cases within the scope of the judicial power of the United States, which might yet depend before the State Tribunals. It was foreseen that in the ordinary exercise of their jurisdiction State courts would, incidentally, take cognisance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all of these cases, the judicial power, by the very terms of the Constitution is to extend. It cannot extend by original jurisdiction, if that was rightfully, and exclu-

sively attached in the State courts, which as has been already shown, may occur. It must, therefore, extend by appellate jurisdiction, or not at all.

"It would seem to follow, that the appellate power of the United States must, in such cases, extend to State tribunals; and if, in such cases, there is no reason why it should not equally to all others within the purview of the Constitution. It has been argued, that such an appellate jurisdiction over State Courts is inconsistent with the genius of our Government and the spirit of the Constitution. That the latter was never designed to act upon State sovereignties, but only upon the people; and that if the power exists, it will materially impair the sovereignty of the States and the independence of their Courts. We cannot yield to the force of this reasoning; it assumes principles and draws conclusions to which we do not assent. It is a mistake that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain, or annul, the sovereignty of the States, in some of the highest branches of their prerogatives. The 10th section of the 1st Article contains a long list of disabilities and prohibitions imposed upon the States. Surely, when such essential portions of State sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the States. The language of the Constitution is also imperative upon the State legislatures, to make laws prescribing the time, places, and manner of holding elections for Senators and Representatives, and for Electors for President and Vice President. And in these, as well as some other cases, Congress have a right to revise, amend, or supercede, the laws which may be passed by the State Legislatures.

"When, therefore, the States are stripped of some of the

highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some respects, under the control of Congress, and in every case are, under the Constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument, that the appellate power over the decisions of State Courts is contrary to the genius of our institutions. The Courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal vitality. Surely, the exercise of the same right over judicial tribunals is not a higher, or more dangerous act of sovereign power. Nor can such a right be deemed to impair the independence of State Judges. It is assuming the very ground in controversy, to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution. And if they should, unintentionally, transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of State sovereignty.

"The arguments used from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course to argue against the existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction, which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere. Wherever it may be

vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior or appellate Court must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter. It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake."

The Judge here instanced the right of appeal, in all cases of captures given in the Articles of Confederation, to Courts to be created by Congress. "It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States, to cases in their own Courts: first, because State Judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and secondly, because Congress must have an unquestionable right to remove all cases within the judicial power, from the State Courts to the Courts of the United States, at any time before final judgment, though not afterward. As to the first reason, admitting that the judges of the State Courts are, and always will be, of as much learning, integrity and wisdom as those of the United States, which we very cheerfully admit, it does not aid the argument.

"It is manifest that the Constitution has proceeded upon a theory of its own, and given, or withheld powers, according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed, whether rightly or wrongly, we do not inquire, that State attachments, State prejudices, State jealouses, and State interests, might sometimes obstruct and control, or might be supposed to obstruct and control, the

regular administration of justice. Hence, in controversies between States; between citizens of different States; between a State and its citizens, or foreigners; it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals.

"This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even the necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States, would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened Convention which framed the Constitution.

"What indeed might have been prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

"There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum; but also for the protection

of defendants, who might be entitled to defend their rights, or assert their privileges before the same forum. Yet, if the construction contended for be correct, it will follow that, as the plaintiff may always elect the State Court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can in no respect be considered as giving equal rights." The Judge, after showing the inadequacy of the supposed power of removal of suits from State to Federal Courts by Congress, to meet the ends of the Constitution, concludes:

"On the whole, the Court are of opinion that the appellate power of the United States does extend to cases pending in the State Courts; and that the twenty-fifth section of the Judiciary Act, which authorizes the exercise of the jurisdiction in the specified cases by a Writ of Error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not oppose a limitation where the people have not been disposed to create one. Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact that this exposition of the Constitution extending its appellate power to State Courts was, previous to its adoption, uniformly and publicly avowed by its friends and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State Conventions.

"It is an historical fact that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and the opponents of that system.

"It is an historical fact that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States of the Union; and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to meet the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition, by all parties, this acquiescence of enlightened State Courts, and these judicial decisions of the Supreme Court, through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perplexing and irremediable doubts."

So absolute and complete a demonstration as this is calculated to compel the assent of every man's reason; nor can its force be resisted by any one who reads it, unless he is under the thraldom of very strong prejudices; and, indeed, the reasoning of the Court appears to have overcome even the violent prejudices of Virginia, since we do not find her questioning the appellate jurisdiction after this; for in 1821, when the case of Cohens vs. Virginia came up, the Court of Appeals recognized it by making a return to the writ of Error, though the question was discussed, and Chief Justice Marshall decided it again, and as an original question; bringing to bear upon it, all of his unrivalled powers of reasoning, his massive judicial endowments, and his intimate acquaintance with the events, the men, and the measures of our Revolutionary and Constitutional eras. I regret that I cannot give any extracts from this decision, since I have already made as extensive quotations as my limits will permit.

During the interval between the case of Fairfax vs. Hunter in 1814, and the year of this case, in 1821, the appellate juris-

diction was asserted, without denial on the part of the State Courts, over cases from Massachusetts, Rhode Island, New York, Pennsylvania, Maryland, in the historical case of Dartmouth College vs. Woodward, from New Hampshire, so often quoted and recognized as the law of the land, and again in a case from Pennsylvania, the decision of which has moulded the jurisprudence and legislation of that State ever since, upon the questions and principles involved in it. Soon after this, the legislative and judicial policy of the State of New York, in reference to the steamboat monopoly of its waters, was reversed by the decree of the Supreme Court in the memorable case of Gibbons vs. Ogden, which not only involved millions, but was calculated to enlist State pride, and to stimulate the feeling of State sovereignty in the "Empire State" of the Union; and notwithstanding all of the Courts of that State had solemnly pronounced the legislation thus completely set aside to be Constitutional. In this case no question of jurisdiction was raised.

After this, appeals were taken successively from the Supreme tribunals of Ohio, Vermont, New York, Tennessee, Louisiana, Kentucky, Maryland, Mississippi, Delaware, Pennsylvania, South Carolina, and Missouri; from some of them more than once; all of them obeying the mandates of the Supreme Court, and recognizing its appellate jurisdiction. Then there were two cases from the State of Georgia, Worcester vs. State of Georgia, and Butler vs. State of Georgia, 6 Peters 515 and 537, in which the Supreme Court of that State refused obedience to the mandates of the Federal Court. The plaintiffs in these cases were convicted of the crime of preaching the gospel to the Cherokees. But the moving cause of the popular excitement, and that which swayed the Court, was jealousy of suspected interference with the institution of

slavery. Under the pressure of this outside excitement, the Georgia Court assumed for its decrees a finality, which they knew was necessary to avert the just judgment of the Supreme Court, as they may again, under the first Administration, which really tries to punish the slave traders of that State; citing, perhaps, the decision of our own Judge Smith as authority.

Since these "Georgia cases," the mandates of the Supreme Court have been obeyed by the Courts of nearly every State in the Union, including Wisconsin. No resistance has been made to the exercise of the appellate jurisdiction, except in the Booth case. From an able contribution upon this subject in the *State Journal*, which has rendered my labor much easier in this particular, we learn that "upwards of Two Hundred cases have been removed from State Courts to the Supreme Court of the United States, as follows:

From Rhode Island	3	From Virginia	5
" Maryland	16	" Massachusetts	13
" Connecticut	2	" Pennsylvania	13
" New York	17	" New Hampshire	2
" South Carolina	3	" Vermont	4
" Ohio	16	" Tennessee	5
" Louisiana	28	" Georgia	2
" Mississippi	8	" Arkansas	11
" Delaware	3	" Maine	2
" Missouri	17	" Illinois	6
" Kentucky	8	" Alabama	19
" Michigan	3	" Iowa	4
" Indiana	4	" Wisconsin	4
" Texas	2	" Florida	2

"Of these, sixty-five have been dismissed as not coming within the act of Congress; sixty-eight have been reversed, and the judgments of reversal acquiesced in, in all, it is believed, except the cases from Georgia and the Booth case from Wisconsin. In the remainder of these cases, the judgments of the State Courts were affirmed."

Thus, it has been shown that the constitutionality of the Judiciary Act of 1789, under the provisions of which the appellate jurisdiction has been exercised for seventy years, has been recognized as unquestionable by the highest Courts of nearly all of the States of the Union, and has been denied in no case save in Virginia, whose Court has since twice recognized it, in Georgia, and in Wisconsin, in the Booth case,* and our own Court has recognized this jurisdiction in other cases. In the exercise of its controlling power as a Court of Appeals the Supreme Court has reversed the judicial policy of great States, again and again, in cases where State interests or State prejudices have distorted the principles of law.

Every citizen of the Union has received his share of the benefits arising from the uniformity, the impartiality, and the beautiful symmetry of our Jurisprudence ensured by this system of appeals; which was designed by the Fathers to produce these happy results, and which has so uniformly met the approbation of the wisest Judges of the various State tribunals, that a Judge who dissents from this, their uniformity of agreement, is apt to become, perforce, an Ishmael among his

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* NOTE.—It is singular that there should exist so much misapprehension as to the positions taken by the different Justices of the Supreme Court in this case.

Judge Smith's "State Rights" theories, developed in the various stages of this case, are strengthened in the minds of many by a supposed concurrence, to a greater or less extent, of Chief Justice Whiton, a Judge who never was famous for "theories," but rather for his clear, practical insight into the law as it is, and a studious avoidance of extraneous matters in his decisions.

This supposed concurrence of Judge Whiton is well known to be a mistake, by those who have read the Report of the case.

For the benefit of such as have not the time to read this rather voluminous document, I will state briefly the various stages of this case, as far as is given in the 3d vol. of our Reports. The later proceedings are fresher and more familiar

The first application of Mr. Booth was made to Justice Smith alone. In his decision upon this application, the Judge criticises the course of Mr.

judicial brethren, and to make use of the vague generalities of the politician, instead of the precise language of Jurisprudence.

He is likely to insist on reiterating phrases applicable only to a state of things which the Constitution was made to remedy, as if reassertions could endow them with vitality or could clothe them with truth.

He is compelled, in order to sustain his position, to assert that the Constitution is a "compact between the States," notwithstanding it contains no covenants between the States, that the States are not mentioned in it as parties, that, by its own terms it emanates from "the people" as directly as the Constitutions of the States, that its language throughout is not the language of compact or treaty, but the imperative dialect of command, to the States as well as to the citizen; and in face

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Booth in allowing two opportunities of applying to the whole Court to pass unimproved. Says the Judge: "I am at a loss to conceive the motive which may have induced him or his advisers to forego such opportunities. "Whether by design or from neccessity, this application has been made to me." (Rep. vol. 3, p. 9.) Mr. Booth had waived the technical defences which were sufficient to discharge him, and saw fit, in the words of the Judge "to demand his discharge upon the invalidity of the law by virtue of which the warrant was issued, or not at all," and the Judge remarks most properly, "I can neither permit, nor accept an such issue." It seems rather strange, after such an introduction, that the Judge should go on, and give a very lengthy opinion, not only as to the constitutionality of the Fugitive Slave Law, but also as to the nature of our Government, enunciating the State Rights theories which have been so much talked about, and so little understood, in this State. One is led to fear that the Judge did, in this way (involuntarily) further the very designs which Mr. Booth entertained.

This was the first proceeding.

Afterwards a writ of "Certiorari" was allowed, and the case came before the whole Court, where it should have come in the first instance. The Justices delivered separate opinions, all of them agreeing as to the vital point in the case, viz., the discharge of Mr. Booth on account of the defectiveness of the process by which he was held, but each giving his own views as to other matters. Chief Justice Whiton believed the Fugitive Slave Law unconstitutional, but nowhere assents, any more than Justice Crawford, to the State Rights Theories of Justice Smith. In fact, he expressly admits the

of the fact that those who made the Constitution intended to supercede an inefficient "compact" by a Government endowed with the sovereign characteristics inherent in the very idea of a government.

He is compelled to say that the State and general governments are "co-ordinate and co-equal within the respective spheres of the departments of the system," while, in fact, these terms are no more applicable than they would be to the respective orbital spheres of Saturn, and of this Earth, which groans under so many fallacies.

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authority of the Federal Supreme Court, for in reply to the objection that the Supreme Court of the U. S. had passed upon the Law in question, he says that there had been no adjudication by that Court upon the "Act of 1850," consequently (these are his very words), "we are not at liberty to consider the question of the right of a person claimed as a fugitive to a trial by jury before he can be surrendered, or delivered up to the claimant, as already settled by the Court which has the power finally to decide all questions growing out of an alleged violation of the Constitution of the United States by an Act of Congress. We must consider the question an open one." Wis. Rep., vol. 3, p. 63.

Let this be always remembered, when it is sought to fortify the individual views of Judge Smith, by the supposed concurrence, in some degree, of the venerable Chief Justice. This was the second proceeding.

Then, on the 21st of July, 1854, Mr. Booth made another application for a "Habeas Corpus," to deliver him from imprisonment on a warrant from the District Court of the U. S. This the Court refused to grant, on the ground that the District Court had obtained jurisdiction.

This was the third proceeding.

Then, the two applications of Booth and Ryecraft, which were the same in all respects, were presented to the Court, Jan. 26, 1855. These applications prayed for relief from imprisonment by virtue of a verdict rendered in the District Court. The Justices delivered their opinions seriatim. Chief Justice Whiton declaring the petitioners entitled to their discharge, on the ground that the District Court had, in these cases, "no jurisdiction to pronounce a judgment," referring to the opinion of Justice Crawford for a fuller exposition of that question. Justice Smith comes to the same result, but theorizes quite at large upon the Constitution. Judges unanimous as to the discharge of the petitioners, Judge Smith, as in the previous instances, alone and unsupported in his State Rights theories, by his Associates. The subsequent proceedings are familiar to every body.

He is compelled to assert that "the Fathers provided no final umpire to decide, in the last resort, between the States and the General Government," in face of the recorded declarations of these "Fathers" to the contrary, expressed so plainly, and with so much precision, that one would suppose that even the Calhoun metaphysics could not refine away their meaning.

He is compelled to reply to the objection of an endless diversity of interpretations, were the State Courts the final arbiters of Constitutional construction, by the trifling query, "what of it?" But it must have been difficult to have forgotten, that it was the avowed object of the Fathers who made the Constitution, to terminate the discordant wranglings of Thirteen Independent States, each construing, finally and differently, the Articles of the Confederation.

He is compelled to argue the equal propriety of an appeal from the Federal to a State Court, with that of a State to the Federal Court, by putting the irrelevant inquiry, "Is his Honor, Mr. Justice Nelson, any more competent to determine the law or the Constitution in Washington than in Albany? as a Judge of the Supreme Court of the United States, than of the Court of Appeals of his own State?" while it would have been just as apposite to ask "why his Honor Judge Paine, sitting at Madison, on the Supreme Bench, should be more competent to construe the law finally, rather than when sitting as County Judge at Milwaukee?"

It is difficult to ignore the plain meaning of the Constitution, the circumstances of its origin, and the objects which were sought by its framers, which were presented by its friends and advocates to the people who adopted it as their supreme law, and which indicate plainly the extent of the powers thus granted by them. It would seem difficult to im-

pugn the wisdom of the greatest judicial minds of the country, who have, for seventy years, in the various State tribunals, acknowledged the appellate jurisdiction of the Supreme Court as the "key-stone of our Constitutional Fabric."

But there are, unfortunately, no limits to assumptions or to their acceptance. The wildest legal chimeras that ever sprung, "like Minerva, full-grown from the head of Jove," if clad with some tattered rags of legal and political phraseology, however motley or ill-adjusted, and tricked out with a few "grand, swelling phrases" of liberty, will find disciples, defenders, and friends enough to drown the "still, small voice" of dissenting reason.

The people are always sound in their fundamental convictions of right and wrong, but are apt to associate the errors and iniquities of the officer with any question involving the powers belonging to his office, and to desire the curtailment of powers which have been abused. If our own State Court were to decree palpable and gross injustice, or to pervert our laws to any dangerous extent, it would soon find that the powers entrusted to it were given for good, and not for evil purposes, and that these powers would be treated as nullities by an indignant people. There is a "Higher Law," of earlier and more authoritative origin than any human enactments; a law which is the ideal standard of wise law-givers, and which, as human laws approach, in that proportion are they excellent—whose mandates can never be disobeyed without danger of penalties which are awful and infinite.

But men of education and ability should never attempt to deceive the people, to trifle with the high behests of conscience, or make it the interpreter of a written and definite Constitution; they should not pervert historical facts; contemn the authority of men who are entitled to our reverence;

nor substitute fanciful speculations as to what our government should be, for the real government established by the people, and endowed by them with substantial powers; which has been effectual for good, yet is liable in bad hands to produce evil; which has accomplished, and is yet to accomplish, the work of a substantial government, supreme within its clearly defined sphere, and which is no more than adequate to the growing exigencies of a vigorous and homogenous people.

We have embarked, as a people, upon a new and untried experiment in self-government, in the success or failure of which we all feel a common interest. The fibres of our national life are all knitted closely together in a solidarity of happiness or woe, and are all affected when one is unstrung or diseased. We are all in one boat, are exposed to common dangers, and all suffer from the evils or the misfortunes of the remotest districts. Maine and California, Wisconsin and Georgia, are as far apart as England and Turkey, as France and Egypt, but the ties of interest and the pulsations of feeling are as strong and tremulous as between any neighboring counties of England.

When our fellow-citizens in Kentucky or Virginia are wantonly stripped of their constitutional rights, we in Wisconsin instinctively feel that the Aegis of our common government ought to shelter them from the fierce storms of State fanaticism. When the jurisprudence of great States has become perverted into an instrument of oppression and cruelty, we all, from Maine to California, naturally look to the Tribunal which was instituted by our fathers "to establish justice," and we feel assured that they gave to it powers adequate for the attainment of this benign object.

Nor will we, if we are wise, abridge or refine away the plainly given and necessary powers of the government to suit

the requirements of a finely-spun theory, which was devised thirty years ago by the subtlest and most dangerous brain ever influential in our politics, in anticipation of events which are yet fully to develop themselves, and to provide for an unfortunate section of our country in advance, a Constitutional doctrine, by virtue of which the rights of citizens of the United States, the Constitutional safeguards to life, liberty and property, and the authority and laws of the General Government, might all be subject to the "discretion" of State despotism.

If dangers thicken around the pathway of our national progress; if the "whole head" of our nation is sick, and the "whole heart faint," by reason of Executive corruption, and of judicial partizanship which poisons the very fountains of justice and paralyzes the influence which has belonged, and will yet belong, to the tribunal of final resort; it becomes, more than ever, the duty and necessity of the people to fill these high places with true men, and such as are equal to the stern requirements of the times. The work will be arduous, protracted, and beset with trials of our faith, but it must be done; it will be done. Even now all the omens are encouraging.

It is not, however, by evasive or forced constructions, which would palsy the energy and powers of the General Government, and would lead us back to chaos again, that we can restore the glorious era of our first Presidents, when the Executive arm was efficient for the good of the whole country, when the National Legislature cared for all of the national interests, and when the Supreme Tribunal of the Union was the universally venerated fountain of our jurisprudence, the recognized arbiter of every Constitutional question which assumed the form of a case for its decision, and the refuge of the

wronged and oppressed, from the erroneous or prejudiced judgments of State Courts.

The whole government, through the dominant influence of an immense monied interest, corrupt and corrupting, through the criminal political apathy of good men and the demoralizing strifes of parties, has been drifting away from the noble purposes and aims of its founders, until it seems to be already upon the fatal rocks and breakers; but, now that we are thus brought face to face with near perils involving all Americans in common disasters, shall we take to the boats, because our pilots have betrayed their trust? Should we not, rather, speedily fill their places with loyal men, and strain every sail and spar, until we have regained our lost track, and are again steering by the old charts, over the old course, cheered by the auspicious constellations which beamed upon our fathers?